

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ANTHONY MARTELLA	:	ORDER
OFFICER OF CAPTAIN TONY'S	:	
PIZZA AND PASTA	:	DTA #806146
EMPORIUM, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1983	:	
through August 31, 1986.	:	

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The Division of Taxation by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel) brought a motion, dated November 14, 1989 and returnable on January 4, 1990, seeking an order dismissing the petition herein for lack of jurisdiction pursuant to 20 NYCRR 3000.5(b)(ii). Petitioner did not submit any papers or evidence in response.

FINDINGS OF FACT

On July 30, 1987, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Anthony Martella, as president of Captain Tony's Pizza and Pasta Emporium, Inc., showing tax due of \$51,795.85, penalty due of \$12,937.91, and interest due of \$18,799.79. The notice explained that under Tax Law §§ 1131(1) and 1133, petitioner was liable individually for the sales and use taxes determined to be due in accordance with Tax Law § 1138(a).

On or about October 23, 1987, petitioner filed a petition (deemed a request for a conciliation conference) contesting the notice of determination described in Finding of Fact "1", supra.

On March 29, 1988, a conciliation conference was conducted by John M. Jones, a conciliation conferee. Pursuant to a conciliation order dated May 6, 1988, the notice of

determination, as described in Finding of Fact "1", supra, was sustained by the conferee.<sup>1</sup>

On or about September 28, 1988, petitioner filed a petition with the Division of Tax Appeals contesting the notice of determination described in Finding of Fact "1", supra. The petition was signed by David Manioci as representative; however, no power of attorney was attached.

On February 2, 1989, the Supervising Administrative Law Judge issued an order dismissing the petition noted in Finding of Fact "4", supra, because it was not in the form required by 20 NYCRR 3000.3, and because petitioner failed to respond to letters of the Division of Tax Appeals dated October 25, 1988 and January 4, 1989 that requested the filing by petitioner of a corrected petition.

On or about February 21, 1989, petitioner filed a Notice of Exception to the determination of the Administrative Law Judge dismissing his petition.

On September 14, 1989, the Tax Appeals Tribunal issued a decision which "remand[ed] this matter to the Supervising Administrative Law Judge to receive evidence from the parties on the timeliness of the petition, in particular, if a conciliation order was issued, the date of such order, and to receive a copy of a properly completed power of attorney appointing Mr. Manioci as petitioner's representative."

On or about September 27, 1989, an unsigned letter was received from Compuchek Corp. noting that it "no longer represent[ed] Anthony Martella or Captain Tony's Pizza & Pasta Emporium, Inc...." David Manioci is apparently associated with Compuchek Corporation of Rochester, New York in some unknown capacity. It should be noted that the unsigned letter from Compuchek Corporation was incorrectly addressed to the "NYS Dept. of Taxation and Finance, Audit Evaluation Bureau, Assessment Review Unit," but was eventually received by the Division of Tax Appeals. This carelessness merely augments previous sloppiness of

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<sup>1</sup>On May 6, 1988, the conferee also issued conciliation orders to Anthony Martella, As Officer of Captain Tony's Take Out Pizza, Inc. and to Captain Tony's Pizza & Pasta Emporium, Inc. sustaining statutory notices and denying requests for revision of determinations. Such statutory notices are not at issue herein.

Mr. Manioci including: the failure to address the issue concerning whether the form of the petition was improper in the Exception filed to the dismissal order; the failure to supply information requested by the October 25, 1988 and January 4, 1989 letters from the Division of Tax Appeals; the failure of Mr. Manioci or petitioner to sign the Exception originally submitted; and Mr. Manioci's apparent failure to ever submit a properly completed power of attorney. The letter from Compuchek Corp. noting its "withdrawal" as representative shows a carbon copy to petitioner from whom no communication has been received with regard to this motion.

The Division of Taxation has submitted evidence to prove that the conciliation order denying petitioner's request was issued and mailed on May 6, 1988 including: (1) an affidavit of Joseph Chyrywat, the Supervisor of Tax Conferences in the Bureau of Mediation and Conciliation Services, that describes in detail the customary procedure followed in his Bureau for the preparation, issuance and mailing of conciliation orders, (2) a copy of the Certified Mail Record of the Bureau of Mediation and Conciliation Services showing that on May 6, 1988 the conciliation order concerning the matter at issue was mailed to both petitioner and his apparent representative, David Manioci, from the Roessleville Branch of the United States Post Office and (3) the affidavit of Daniel D. Lafar, the Principal Mail and Supply Clerk who described in detail the regular procedure followed in delivery outgoing mail to branch offices of the United States Post Office.

#### CONCLUSIONS OF LAW

A. Tax Law § 170.3-a(e) provides as follows:

"A conciliation order shall be rendered within thirty days after the [conciliation] proceeding is concluded and such order shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary."

If this section is applicable to the matter at hand, the petition filed by petitioner on September 28, 1988 was not timely because it was not filed within 90 days after the conciliation

order dated May 6, 1988 was issued. The Division has proven that such conciliation order was, in fact, issued and mailed to petitioner, as well as his apparent representative, David Manioci, on May 6, 1988. Consequently, the petition was required to have been filed on or before August 4, 1988 to be timely. Rather, it was filed 55 days late on September 28, 1988.

B. The Laws of 1986 (ch 282, § 32) provided in part as follows:

"This act [creating the new two-part system under the Bureau of Conciliation and Mediation Services and the Division of Tax Appeals] shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent that this act can be made applicable...."

The Tax Appeals Tribunal has not viewed this language as requiring the application of the procedural requirements of section 170.3-a(e) so as to annul the rights of a petitioner to a hearing if a petition was timely filed for such a hearing prior to September 1, 1987 (Matter of Robert Chamberlin, Tax Appeals Tribunal, September 14, 1989). However, in the matter at hand, the original petition resulting in the conciliation conference was filed on October 23, 1987, a date subsequent to the effective date of the new two-part system. Therefore, Tax Law § 170.3-a(e) is applicable to the matter at hand, and the petition for a hearing with the Division of Tax Appeals herein was not timely.

C. Furthermore, as noted in Finding of Fact "8", supra, petitioner never submitted a properly completed power of attorney appointing David Manioci as his representative. Consequently, the various documents in this matter executed by Mr. Manioci on behalf of petitioner, including the late-filed petition dated September 28, 1988 are of questionable legal force or effect. Therefore, it might be concluded that the issue herein is not whether the petition dated September 28, 1988 was timely but whether there was a petition filed on behalf of petitioner in the first instance. But in light of Conclusion of Law "B", supra, it is not necessary to resolve this issue concerning Mr. Manioci's authority to act on behalf of petitioner.

D. The motion of the Division of Taxation is granted and the petition of Anthony Martella, officer of Captain Tony's Pizza and Pasta Emporium, Inc., is dismissed.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE